MOTION FILED
MAR 5 1999

(3)

No. 98-1077

In The

Supreme Court of the United States

October Term, 1998

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, LINDEMAN BROTHERS, INC., AND YUBA TRUCKING, INC.,

Petitioners,

v.

ROBERTA E. MENDONCA, LLOYD W. AUBRY, JR., JAMES W. VAN LOBEN SELS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF CALIFORNIA TRUCKING ASSOCIATION AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY (M-CARTS) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE CALIFORNIA PREVAILING WAGE LAW, WHICH LAW SIGNIFICANTLY INCREASES THE COST OF SERVICE OF TRUCKING COMPANIES AND INTERFERES WITH THE MANNER OF SERVICE, HAS BEEN PREEMPTED BY THE FEDERAL STATUTE PROHIBITING STATE REGULATION OF TRUCK PRICES, ROUTES OR SERVICE?

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY CALIFORNIA TRUCKING ASSOCIATION (CTA) AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY (M-CARTS) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The California Trucking Association (CTA) and the Michigan Citizens Allied for Responsible Transportation and Safety (M-CARTS) respectfully request this Court to grant them leave to file an Amicus Curiae brief in support of Petitioners' Petition for Writ of Certiorari.[1] This Motion is filed pursuant to Rule 37 of the Rules of the United States Supreme Court.

CTA is a trade association made up of California trucking companies and suppliers to the truck industry. M-CARTS is a trade association of trucking companies located in the state of Michigan, which was organized to present views on legal issues impacting the Michigan trucking industry. The issue presented in this case

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[1] Petitioners, Californians for a Safe and Competitive Dump Truck Transportation, Lindeman Brothers, Inc., and Yuba Trucking, Inc., as well as Respondents, International Brotherhood of Teamsters, AFL-CIO have consented to the filing of this brief. Roberta E. Mendonca, Lloyd W. Aubry, Jr., James W. Van Loben Sels, the California Department of Transportation, the California Department of Industrial Relations, and the California Division of Labor Standards Enforcement, California Department of Transportation, have not consented to the filing of this brief, necessitating a motion pursuant to Rule 37 of the Supreme Court Rules. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

directly impacts the members of CTA, involving as it does the continued enforceability of a California state statute impacting the trucking industry. The issue confronted by the proceeding further has a significant impact on the laws of other states, such as Michigan, and their continued validity in light of the sweeping federal preemption enacted by Congress as Section 601 of the Federal Aviation Administration Authorization Act of 1994, now codified at 49 U.S.C. § 14501(c)(1).

The continued enforcement and applicability of a patchwork of state laws directly affecting the routes and service provided by the trucking industry is directly contrary to the findings made by Congress and contained in the text itself of the 1994 legislation prohibiting state regulation of this industry. Congress found, in enacting Section 601, that state regulation of intrastate truck transportation had impeded the "free flow of trade, traffic and transportation of interstate commerce." This, Congress declared, "placed an unreasonable cost on the American consumers." *See* Section 601(a)(1) of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Tit. IV, 108 Stat. 1604. Congress modeled that preemption directly upon the preemption accomplished by it in the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707.

This case is one of a series of cases which is interpreting the scope of those preemptions, as well as the impact of two recent pronouncements by this Court as to the scope of the preemption accomplished here. The issue in this case is of vital importance as it affects the trucking industry.

Given their membership and interests, the Amici believe that they can bring to the attention of the Court fresh and relevant matters.

Dated this 5th day of March, 1999.

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INTEREST OF THE AMICI CALIFORNIA TRUCKING ASSOCIATION AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY

The California Trucking Association (CTA) is a trade organization of California trucking companies and suppliers to the California trucking industry. CTA has among its membership a broad cross-section of trucking companies of various types and sizes serving the citizens and businesses of the State of California. Michigan Citizens Allied for Responsible Transportation and Safety (M-CARTS) is also a trade organization, made up of trucking companies located within the State of Michigan, specifically organized in 1988 to present positions on legal and statutory issues involving regulation of the trucking industry. The continued enforcement of California's prevailing wage law, at issue in this proceeding, directly affects the operations of CTA members. Further, as the enforceability of this law has relevance to similar statutes in other states, M-CARTS has a direct interest in the important issue involved in this proceeding.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

A Writ of Certiorari should issue from this Court to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit committed error, in ruling that the

Federal Aviation Administration Authorization Act of 1994 Pub. L. No. 103-305, Tit. IV 108 Stat. 1604 (F4A) did not preempt California's prevailing wage law (CPWL), as set forth in California Labor Code Sections 1770-80. The ambit of the federal preemption of state laws relating to price, routes, or service of trucking companies certainly encompasses the CPWL, the applicability of which raises truck rates by twenty-five percent, negatively impacts the routing of trucks, and limits service as well.

Congress explicitly declared, in the course of enactment of Section 601 of F4A in 1994, that it was modeling the truck preemption on the airline preemption enacted some sixteen years previously, in the Airline Deregulation Act of 1978 Pub. L. No. 95-405, 92 Stat. 1707 (ADA), as then recently interpreted by this Court in *Morales v. Trans World Airlines*, 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992). Within weeks of the effective date of the truck preemption of January 1, 1995, this Court handed down another significant interpretation of the air preemption, in *American Airlines v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L.Ed.2d 715 (1995). This Court, in *Wolens*, held preempted by the ADA not a state economic regulatory statute, but rather a state consumer fraud and deceptive business practice statute, sought to be applied to airlines. Despite the fact that it was a law of general applicability, this Court found that such a statute related to the price, routes, or service of airlines and was accordingly preempted.

The same should hold true with respect to statutes such as the CPWL. Trucking companies should be subject to federal regulations with respect to their provision of service, and not a confusing and conflicting hodgepodge

of state laws and regulations. Only through such an interpretation can the true purpose of the motor preemption be accomplished – to eliminate the costly and confusing state interference with interstate commerce in the transportation industry.

The decision of the Ninth Circuit panel in *Mendonca* is directly contrary to this Court's precedent in *Wolens*. The importance of this issue as to the scope of the corresponding airline-motor carrier preemptions of Congress is demonstrated in the number of circuit courts recently addressing the scope of the preemption. The petition should be granted, so that this Court's interpretations in *Morales-Wolens* will be consistently applied to the motor carrier (and airline) industries.

I. THE F4A PREEMPTION OF STATE REGULATION OF LAWS RELATING TO PRICES, ROUTES, OR SERVICES WILL BE THWARTED, IF THE NINTH CIRCUIT DECISION IS ALLOWED TO STAND.

The Ninth Circuit analysis of the F4A preemption is fundamentally flawed. If that analysis is allowed to stand, it will significantly detract from the broad scope of the preemption intended to have been accomplished by Congress, directly contrary to its express intent. In the Ninth Circuit decision below, the court erred significantly in analyzing the legislative history of Section 601. It did so when it assumed that the federal preemption of state controls over the trucking industry did not affect those jurisdictions which did not engage in economic regulation of the trucking industry. Petitioners' Appendix A, p. 11A, 152 F.3d at 1187. The court below concluded that,

as seven of the jurisdictions which did not then engage in economic regulation of the trucking industry still possessed prevailing wage laws, then Congress could not have intended that prevailing wage laws such as the CPWL be preempted by Section 601.

In the congressional history, Congress outlined a particular problem. That problem may have been caused by what Congress viewed as historical economic regulatory statutes for the trucking industry. However, the panel ignored the fact that the remedy Congress adopted, i.e., utilizing the earlier language employed by it in the ADA, affects state laws in a much more sweeping fashion than merely those of traditional economic regulatory statutes. That this is true can be seen by examining *Wolens*. At issue in *Wolens* was a state consumer protection statute. Illinois, at the time of the passage of the ADA, did not regulate its intrastate airline industry from an economic standpoint.[2] Yet, the offending statute, a statute of general applicability to all businesses, was still offensive to the scope of the airline preemption, because it did affect the rates, routes, or service of an air carrier. Such a statute could not be enforced in the face of the federal preemption.

It is true, as the Ninth Circuit noted below, that the initial impetus for the truck preemption legislation in 1994 grew out of a concern about disparity in economic enforcement between air carriers and motor carriers, brought about by an earlier decision of the Ninth Circuit

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[2] Only three states (California, Florida and Texas) regulated intrastate airline transportation at the time of enactment of the ADA.

in *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). However, the Ninth Circuit decision below failed to consider that the initial legislative proposal to preempt only the package delivery industry was significantly expanded by Congress to include the entire motor carrier industry, deliberately employing the same language in Section 601 that it had earlier utilized in the ADA. As Congress stated, it "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . . " H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess., at 83 (1994), reprinted in 1994 U.S.C.C.A.N. 677 at 1755.

It is true, in *Wolens*, that this Court, in interpreting the scope of the ADA preemption, ruled that routine breach of contract claims were not preempted. In doing so, however, the Court declared:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own self-imposed undertakings.

115 S. Ct. at 824. The CPWL, however, is a state-imposed obligation. The scope of the Section 601 preemption is substantially diluted through the decision of the Ninth Circuit below, if it is allowed to stand. A Writ should issue here to correct that error.

II. THE CPWL IS RELATED TO PRICES, ROUTES, OR SERVICES.

The Ninth Circuit below concluded that the effect of the CPWL was no more than "indirect, remote, and tenuous" on the prices, routes, and services of California motor carriers. Petitioners' Appendix, p. 15A, 152 F.3d at 1189. Accordingly, it held that the CPWL fell outside the parameters of the Section 601 preemption. This analysis is flawed as well. By dramatically interfering with the manner in which California motor carriers can provide truck services as well as impacting the prices which must be charged by those carriers in a momentous way, the CPWL is related to the prices, routes, and services charged by trucking companies.

A similar issue was addressed by the Michigan state courts, *In Re Federal Preemption of Provisions of the Motor Carrier Act*, 223 Mich. App. 288, 566 N.W.2d 299 (1997), *leave to appeal denied*, 458 Mich. 852 (1998), *cert. denied*, 119 S. Ct. 544. Because a provision of Michigan state law requires trucking companies to treat their drivers as employees, the Court found that the statute was " 'related to' the cost and ability of many motor carriers to provide their services in Michigan." 223 Mich. App. at 309. The Michigan provision mandated a type of relationship between a motor carrier and its drivers, thereby affecting routes and services and "most probably . . . prices." 223 Mich. App. at 309.

The CPWL in fact produces the acute economic effects that call for preemption. It directly affects competition, by mandating higher cost and thereby higher prices, as well as inducing carriers to rely on independent

contractors, as contrasted with employee drivers. This is just the sort of interference with the marketplace that Section 601 was designed to prevent. The Ninth Circuit decision on the "related to" aspect of the CPWL is erroneous also. A Writ should be granted in this respect as well.

III. A SYSTEM OF FEDERAL LAWS AND REGULATIONS SHOULD BE APPLIED TO THE SERVICES OF THE TRUCKING INDUSTRY, NOT STATE LAWS.

The decision of the Ninth Circuit below subjects carriers to a continued conflicting maze of state laws and regulations, vis-à-vis their workforce. The Writ should be granted to review whether federal or state regulations or both govern motor carrier services in light of the federal preemption.

That this issue is of profound importance to the transportation industry is reflected in the numerous recent cases concerning this very issue. This issue was addressed most recently in *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999). In *Wellons*, a sharply divided Sixth Circuit panel reversed the lower court and ruled that Michigan's Civil Rights Act was not preempted in an action brought by a former reservation clerk against an airline for race discrimination and related common law tort claims. In dissent, Judge Krupansky disagreed, stating that the ADA preemption represented a congressional judgment "to forestall all state regulation of commercial airlines and any and all particulars related to their prices, routes, and services, in favor of exclusive

federal regulation (accompanied by a large measure of overall deregulation). Because the employment relationship is, as a matter of law, inextricably connected to a business's provision of services to its customers, all non-contractual employment discrimination claims pressed by past, present, or potential future employees against commercial airlines must be solely anchored in federal law." 165 F.3d 504.

Disagreement among courts on this issue was demonstrated by two separate panels of the Michigan Court of Appeals, one of which held in *Fitzpatrick v. Simmons Airlines, Inc.*, 218 Mich. App. 678, 555 N.W.2d 479 (1996), that Michigan's Civil Rights Act was preempted by the ADA, in an action brought by an airline baggage handler against his former employer for discrimination based on his weight and another of which held in *Gilman v. Northwest Airlines, Inc.*, 230 Mich. App. 293, 583 N.W.2d 536 (1998), that the Michigan Civil Rights Act was not preempted, in an action by an airline account executive, alleging age and sex discrimination under the same civil rights act.[3]

Three other recent circuit court of appeals decisions have involved similar issues. In *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997), the Second Circuit found New York's human rights law not preempted with respect to a series of age-discrimination claims, reversing

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[3] *See, also, Belgard v. United Airlines*, 857 P.2d 467 (Colo. Ct. App. 1992), in which another state court held preempted in an action by pilots under Colorado's Handicapped Discrimination Act.

the determination of the district court.[4] In *Aloha Islandair, Inc. v. Tseu*, 128 F.3d 1301 (9th Cir. 1997), the Ninth Circuit held not preempted Hawaii's disability discrimination provisions, reversing the judgment of the district court.[5] In *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463 (11th Cir. 1998), the Eleventh Circuit held not preempted Florida's civil rights law in an action brought by a former airline employee alleging age discrimination, reversing the district court dismissal of the action on preemption grounds.[6] In the latter case, the panel distinguished the decisions such as *Belgard* and *Fitzpatrick*, by noting that the preemption argument in *Parise* was premised on a defense offered by the airline, and not on the state law in which the claim was based. These cases demonstrate the differing approaches which are being taken by the courts on the ADA F4A preemption question as it specifically relates to states affecting the employment terms of carriers' employees.[7]

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[4] *See Abdu-Brisson v. Delta Airlines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996).

[5] *See Aloha Islandair, Inc. v. Tseu*, Case No. 94-00937, 1995 WL 549319 (D. Hawaii, July 13, 1995).

[6] *See Parise v. Delta Airlines, Inc.*, Case No. 95-1149-CIV-ORL-22, 1997 WL 375296.

[7] These difficulties present themselves in the tort context as well. *See Smith v. Comair, Incorporated*, 134 F.3d 254 (4th Cir. 1998), holding preempted certain breach of contract and intentional tort claims based on an airline's refusal to permit a passenger to board, and certain other claims not preempted; *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), holding actions arising out of an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage and other similar amenities not preempted and thereby

Of course, in this case, it is not necessary for the Court to rule that all state action is preempted by Section 601 of the F4A, the position advocated by Judge Krupansky in dissent in *Wellons, supra*. (*See* Petition, p. 17, fn. 16.) That is because the California CPWL has a startling and profound effect on motor carrier prices and services. The Writ should be granted in this case, because of the direct connection between the CPWL and prices, routes, and services. This case also presents the opportunity for this Court to underscore the primacy of the federal interest, in regulating transportation entities such as air and motor carriers. As these many cases demonstrate, the ramifications of the issue involved in this case are national in scope and extends to myriad situations. For this reason, the Writ should be granted.

CONCLUSION

The Ninth Circuit ignored the language of Congress in Section 601(a) of F4A itself, where Congress found that state regulation had impeded the free flow of commerce and placed unreasonable costs on American consumers. The Ninth Circuit ignored the legislative history of the F4A, where Congress laid out the map of *Morales* (and subsequently *Wolens*) for interpreting the scope of the

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expressly overruling *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), and *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997); and *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998), finding a defamation and accompanying punitive damages claim brought by a travel agency against an airline not preempted.

motor carrier preemption. It also ignored the acute impact which the CPWL has on motor carrier prices, routes, and services. The federal method of regulation for a carrier's operations should be primary, under Section 601 of the F4A. The decision below represents an erosion of the preemption. A Writ of Certiorari should be granted by this Court to redress this erroneous conclusion in an area of vital significance not only to carriers in California, but in Michigan and throughout the United States.

Respectfully submitted,

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